COMMENTS

Resolving the Softwood Lumber Dispute

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I. INTRODUCTION

As international trade increases, domestic demands and regional trade disputes can strain relations among nations and produce intractable situations in which economics and politics conspire to impair long-term solutions. Such is the case in the decades-long dispute between Canada and the United States over trade in softwood lumber,[1] the building blocks of the United States housing industry.[2] The United States lumber industry is facing plummeting demand.[3] New housing starts are expected to reach fewer than half of the starts in 2005, the lowest amount since World War II.[4] This decline has led to layoffs and mill closures. Simultaneously, lumber delivery costs are rising with the price of oil,[5] which

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1. Softwood is wood from a coniferous tree, which includes fir, spruce, pine, hemlock, and cedar. *See* Harmonized Tariff Schedule of the United States—Supplement 1, § IX, 4407.10.01, 4409.10.10, .40, .90 (2008), 19 U.S.C. § 1202, *available at* http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0810C44.pdf.

2. The largest volume market for softwood lumber in North America is structural framing. Lloyd C. Irland, *Economic Structure and the U.S.-Canadian Softwood Lumber Trade—Any Connections to Trade Conflicts?*, *in* JAMES B. HENRY CENTER, MICHIGAN STATE UNIV., U.S.-CANADA FOREST PRODUCTS: A BILATERAL TECHNICAL SYMPOSIUM 95, 99 (2005), *available at* http://www.maes.msu.edu/publications/researchreports/SR/SR125.pdf.

3. Press Release, Western Wood Products Ass'n, Historical Housing Downturn to Continue in 2008, Impacting Lumber Demand, Western Mills (Mar. 26, 2008) (on file with author).

4. *Id.*

5. WASH. STATE DEP'T OF NATURAL RES., ECON. & REVENUE FORECAST, FISCAL YEAR 2008, FIRST QUARTER 13 (2007), *available at* http://www.dnr.wa.gov/Publications/obe_econ_rprts_rev

reached record highs in 2008.[6] Although low lending rates and a weak dollar mitigate against the complete demise of the United States lumber industry, its short-term outlook is grim.[7] The outlook for Canada's lumber industry is not much better. Canadian lumber mills are also operating under capacity.[8] Low lumber prices, thus, are taxing the lumber industry on both sides of the border, and prices continue to drop.[9] Meanwhile, anti-free trade rhetoric grows in depressed local economies as American and Canadian jobs are outsourced, making a failing lumber industry and a backlash against free trade inevitable.

Against this backdrop, the United States faces a lumber war against Canada. For the last quarter of a century, the United States has accused Canada of dumping[10] subsidized lumber into the United States marketplace at the expense of American lumber producers. Neither country, however, can claim the high ground when government involvement in Canada gives rise to allegations of unfair subsidies and when powerful lobbying in the United States subverts the nation's professed allegiance to free trade. Moreover, the dispute resolution mechanisms that were supposed to settle the dispute have only exacerbated the tension between the two countries.

The latest attempt to settle the dispute are proving as contentious as previous attempts. On September 12, 2006, the United States and Canada signed the Softwood Lumber Agreement ("SLA 2006").[11] Under its terms, the two countries would end litigation over softwood lumber and

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for_sept07.pdf [hereinafter WASH. FORECAST 2008].

6. Although the price of oil fluctuates, it peaked in July 2008 at $147 a barrel. *See* Robin Pagnamenta, *Price of Oil Nudges Back Above $130*, TIMES (London), July 19, 2008, at 57, *available at* http://business.timesonline.co.uk/tol/business/industry sectors/article4360003.ece. The United States and Canada signed the Softwood Lumber Agreement on September 12, 2006. Softwood Lumber Agreement, U.S.-Can., Sept. 12, 2006, as amended Oct. 12, 2006, *available at* http://www.dfait-maeci.gc.ca/trade/eicb/softwood/SLA-main-en.asp [hereinafter SLA 2006]. At the time, the price of oil was less than $66 a barrel and falling. Steven Mufson, *OPEC Leaves Oil Output Quotas in Place as Price Keeps Falling: Costs at Pump Have Dropped 42 Cents Since Aug. 7*, WASH. POST, Sept. 12, 2006, at D07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/11/AR2006091100163.html.

7. WASH. FORECAST 2008, *supra* note 5, at 12, 13.

8. WASH. FORECAST 2008, *supra* note 5, at 13. While lumber mills in the western United States are operating at 70% capacity, mills in Canada are operating at only 80% capacity. *Id.*

9. *Id.* at 14.

10. Dumping occurs when a country exports a good at a lower price than the good costs in its domestic market. Beatriz Leycegui & Mario Ruiz Cornejo, *Trading Remedies to Remedy Trade: The NAFTA Experience*, *in* KEEPING THE BORDERS OPEN 167 n.1 (R.M.A. Loyns et al. eds., 2004), *available at* http://pdic.tamu.edu/flags/grey.pdf.

11. Press Release, Office of the U.S. Trade Rep., Schwab Pleased by Canadian Action Taken on Softwood Lumber Agreement (Sept. 19, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/September/Schwab_Pleased_by_Canadian_Action_taken_on_Softwood_Lumber_Agreement.html.

allow free trade when market conditions were favorable.[12] The agreement seemed promising: as U.S. Trade Representative Susan Schwab announced, "[the United States has] closed this long-running dispute that has for too long created friction with our largest trading partner."[13] Within a year of the agreement, however, the United States had initiated arbitration proceedings in the London Court of International Arbitration ("LCIA")[14] to "compel Canada to live up to its trade obligations."[15] Two months before the arbitration panel issued its decision settling the dispute,[16] the United States filed a second request for arbitration.[17]

As this current dispute and years of conflict demonstrate, the softwood lumber dispute is too political to be resolved by any legal regime. Although the efficiency, the technical expertise, and the apolitical nature of the LCIA make it the best mechanism so far in settling trade agreement battles, the political and economic pressures inherent in this interminable lumber war mean that future battles are inevitable.

This Comment argues that the LCIA will be able to resolve disputes involving softwood lumber but not resolve the softwood lumber dispute. Part II reviews the history of the dispute. Part III discusses the lessons that Canada and the United States have learned about resolving trade disputes, several of which are reflected in the current agreement. Part IV examines why, although the current agreement provides a degree of neu-

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12. *Id.* During unfavorable times, Canadian provinces may either impose a five to fifteen percent export tax or impose a lower tax and limit export volumes. *Id.*

13. Press Release, Office of the U.S. Trade Rep., U.S. Trade Representative Susan C. Schwab Announces Entry into Force of U.S.-Canada Softwood Lumber Agreement (Oct. 12, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/October/US_Trade_Representative_Susan_C_Schwab_Announces_Entry_into_Force_of_US-Canada_Softwood_Lumber_Agreement.html.

14. The LCIA is an established nongovernmental institution that has traditionally settled private commercial disputes. John R. Crook, *United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration*, 102 AM. J. INT'L L. 192, 192 (2008).

15. Press Release, Office of the U.S. Trade Rep., United States to Request Arbitration Challenging Canada's Implementation of the 2006 Softwood Lumber Agreement (Aug. 7, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_to_Request_Arbitration_Challenging_Canadas_Implementation_of_the_2006_Softwood_Lumber_Agreement.html. The United States alleged that Canada had improperly implemented certain export measures required by the agreement. *Id.*

16. In March 2008, the panel concluded that Canada had violated the SLA in its eastern provinces, but not in its western provinces. *See* Press Release, Office of the U.S. Trade Rep., USTR Disappointed with Tribunal's Mixed Decision on Softwood Lumber (Mar. 4, 2008), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/March/asset_upload_file97_14550.pdf.

17. Request for Arbitration, Softwood Lumber Dispute (U.S. v. Can.) (Lon. Ct. Int'l Arb. Jan. 2008), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/2006_Softwood_Lumber_Agreement/Arbitration_on_Provincial_Subsidies/asset_upload_file409_14419.pdf. This request challenged subsidy programs in Quebec and Ontario that benefited the Canadian softwood lumber industry. *Id.*

trality and finality to the dispute that prior regimes lacked, inherent political pressures will prove too large for even this agreement. Finally, Part V concludes that the dispute might only be resolved with an economic compromise.

II. THE SOFTWOOD LUMBER DISPUTE

This Part describes the tumultuous history of the softwood lumber dispute. Section A discusses factors that have aggravated the dispute. Sections B through D describe the battles of the dispute known as Lumber I, Lumber II, Lumber III, and Lumber IV and the agreements that partitioned them. Finally, Section E summarizes the 2006 Softwood Lumber Agreement.

A. Aggravating Factors of the Dispute

Because the United States lumber industry can only satisfy 50%[18] of the housing industry's demand for building material,[19] it imports a large percentage of its lumber from Canada.[20] Canada has an ample supply of accessible softwood lumber,[21] which it has had only limited success exporting to countries other than the United States.[22] Although this exchange seems mutually beneficial, two factors[23] make the trade relationship problematic:[24] (1) different systems of forest management and (2) international oversight of the domestic laws that govern the trade relationship.

1. Different Systems of Forest Management

First, and perhaps most significantly, the United States and Canada have different ways of managing their lumber resources. In the United States, private companies own most of the forests and sell short-term

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18. Michael Hart & Bill Dymond, *The Cul-de-Sac of Softwood Lumber*, 26 POL'Y OPTIONS 19, 19 (2005), *available at* http://www.irpp.org/po/archive/nov05/hart.pdf.

19. According to the Department of Agriculture, new housing construction accounts for over a third of the United States's annual consumption of softwood sawn wood products and for substantial volumes of other softwood products. 2004-2008 USDA U.S. FOREST PRODUCTS ANN. MARKET REV. & PROSPECTS 1, *available at* http://www.fpl.fs.fed.us/documnts/fplrm/fpl_rm305.pdf.

20. *Id.*

21. Hart & Dymond, *supra* note 18, at 19. Canada exports over 70% of its lumber. *Id.*

22. *Id.* Europe, Japan, and China do not have the demand that the United States does for materials to build wood-frame housing. *Id.*

23. There are other factors beyond the scope of this Comment. For example, one issue centers on whether Canadian softwood lumber and United States softwood lumber are substitutable in the marketplace. *See generally* Rao V. Nagubadi, Daowei Zhang, Jeffrey P. Prestemon & David N. Wear, *Softwood Lumber Products in the United States: Substitutes, Complements, or Unrelated?*, 50 FOREST SCI. 416 (2004).

24. Hart & Dymond, *supra* note 18, at 19.

cutting rights to their timber in arm's-length transactions, either through auctions or through private contracts.[25] Market demand, thus, determines the price of the timber and directly affects the cost of turning the timber into lumber.[26]

In contrast, most of the forests in Canada are located on Crown (public) lands, which the provincial governments control.[27] Provincial control ensures an adequate timber supply to the local mills and stabilizes employment within the mill towns.[28] Each province has its own system of forest management and uses a different method to calculate the amount that harvesters must pay for the right to cut timber.[29] This system of timber pricing is difficult to change because harvesting rights are often embedded in long-term arrangements or licenses between harvesters and the provinces.[30]

The fundamental differences between the two systems result in what critics in the United States call an unfair subsidy for Canadian lumber producers (i.e., cheap timber) and what defenders in Canada call a "competitive advantage."[31] For the United States, the issue of subsidy is clear: when prices fall, United States lumber producers must reduce production to remain competitive, whereas the more insulated Canadian lumber producers are able to sell their lumber at low prices for a longer period, minimizing the need to cut production.[32] Canada, however, argues that the situation is more complicated: many United States markets

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25. Gary C. Hufbauer & Yee Wong, *Security and the Economy in the North American Context: The Road Ahead for NAFTA*, 29 CAN.-U.S. L.J. 53, 65 (2003); *accord* Henry Spelter, *If America Had Canada's Stumpage System*, 52 FOREST SCI. 443, 443 (2006).

26. Hart & Dymond, *supra* note 18, at 20. For the purposes of this Comment, lumber is defined as timber sawn into rough planks. In a market economy, the price of timber accounts for 60% to 70% of the cost of lumber. John A. Ragosta, *Trade and Agriculture, and Lumber: Why Agriculture and Lumber Matter*, 14 KAN. J.L. & PUB. POL'Y 413, 424 (2005). Hauling and cutting the timber account for the rest of the price. *Id.*

27. *Compare* F.J. Anderson & Robert D. Cairns, *The Softwood Lumber Agreement and Resource Politics*, 14 CAN. PUB. POL'Y 186, 187 (1988), *available at* http://economics.ca/cgi/jab?journal=cpp&view=v14n2/CPPv14n2p186.pdf (70% of merchantable lumber on Crown lands), *with* RUSS W. GORTE & JEANNE GRIMMETT, CONG. RESEARCH SERV., LUMBER IMPORTS FROM CANADA: ISSUES AND EVENTS 3 (2001), *available at* http://canada.usembassy.gov/content/can_usa/pdfs/ lumber_crs_052101.pdf (provinces own 90% of Canadian timberlands).

28. Hufbauer & Wong, *supra* note 25, at 65.

29. Hart & Dymond, *supra* note 18, at 19. For example, in British Columbia, fees to cut a particular timber stand are calculated relative to the average value of other stands in the region from the preceding period. *See* R. Quentin Grafton, Robert W. Lynch & Harry W. Nelson, *British Columbia's Stumpage System: Economic and Trade Policy Implications*, 24 CAN. PUB. POL'Y S41, S44–S45 (1998).

30. This is particularly true in British Columbia. *See* Hart & Dymond, *supra* note 18, at 19–20.

31. Spelter, *supra* note 25, at 443 (quoting forestry consultant Russell Taylor: "Canada has a competitive advantage in the way it prices timber, but it's not a subsidy").

32. *Id.* at 444.

prefer Canadian lumber;[33] the United States system is bogged down by environmental regulation;[34] the United States lumber mills are not as efficient; and trees in the United States are less accessible.[35]

Given, however, the tumultuous history of the dispute, these semantics—whether the "competitive advantage" amounts to a subsidy—are largely irrelevant. As long as the lumber industries in both Canada and the United States perceive each other as anti-competitive and continue to lobby their governments to protect their domestic interests, the dispute will not end, despite the availability of recourse to international dispute settlement forums.

2. International Oversight of Domestic Laws

Another aggravating factor that hinders the dispute's resolution is international oversight of domestic trade laws. Both Canada and the United States have countervailing duty[36] and antidumping[37] laws to limit foreign competition with domestic industries.[38] Countries implementing these laws maintain that the laws' purpose is to ensure fair trade, while countries exporting goods maintain that the laws' purpose is to protect domestic industries by discouraging cheap imports.[39]

In the United States, countervailing duty and antidumping cases begin when a domestic industry files a compliant alleging that a foreign government is subsidizing or dumping an export in the United States market to the detriment of a domestic industry.[40] The Department of

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33. *See* Anderson & Cairns, *supra* note 27, at 186.

34. *See, e.g.*, Qing Xiang & Runsheng Yin, *Impact of Globalization and Policy Change on United States Softwood Lumber Trade*, 52 FOREST SCI. 381, 381 (2006) (giving the example of protection of the spotted owls halting national timber sales in the 1980s in the Pacific Northwest).

35. The adverse economic consequences of the softwood lumber dispute might have made the Canadian industry more efficient. Hufbauer & Wong, *supra* note 25, at 65 n.44.

36. A countervailing duty is a duty levied on an imported good to offset subsidies to producers or exporters of that good in the exporting country. OFFICE OF INVESTIGATIONS, U.S. INT'L TRADE COMM'N, ANTIDUMPING & COUNTERVAILING DUTY HANDBOOK A-3 (2007), *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/documents/handbook.pdf.

37. Dumping occurs when a product is sold in an importing country at a price that is lower than the price at which it is sold in the exporting country. *Id.* at A-4.

38. *See* discussion *infra* Parts II.B & II.D. In the United States, to impose a countervailing duty or tariff, the complaining industry must establish three things: (1) the imported goods are being subsidized (subsidization); (2) the subsidized goods are either materially injuring the industry or threatening to materially injure the industry (injury); and (3) there is a causal link between the subsidy and the injury (causation). 19 U.S.C. § 1671 (2007). To prove dumping, a complaining industry must similarly prove three things: (1) the goods are being dumped; (2) the dumping is causing a material injury or threat of a material injury; and (3) there is a causal link between the dumping and the injury. 19 U.S.C. § 1673 (2007).

39. *See* ASHISH K. VAIDYA, GLOBALIZATION: ENCYCLOPEDIA OF TRADE, LABOR, AND POLITICS 3 (2005).

40. Bruce A. Blonigen, *The Effects of NAFTA on Antidumping and Countervailing Duty Activ-*

Commerce ("Commerce")[41] conducts countervailing duty and antidumping investigations and determines whether the import is, in fact, being subsidized and dumped into the market.[42] Simultaneously, the International Trade Commission ("ITC" or "Commission")[43] investigates whether the subsidized import is causing an injury, or is threatening to cause an injury, to a domestic industry.[44] If an import is subsidized, and if that subsidization is injuring a domestic market, then the authorities will impose duties[45] to correct the market distortion.[46]

Because countervailing duty and antidumping laws affect international trade, bilateral and multilateral trade treaties regulate their application. In April 1994, after eight years of negotiations to reform the rules governing international trade,[47] the ministers of 117 countries signed the agreement that created the World Trade Organization ("WTO").[48] The WTO is an international organization that seeks to expand international trade of goods and services. Its most important function is to implement and adjudicate the General Agreement on Tariffs and Trade ("GATT").[49] The GATT contains provisions to ensure the promotion of free trade, including prohibitions on trade preferences for selected countries[50] and

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ity, 19 WORLD BANK ECON. REV. 407, 410 (2005).

41. Specifically, the International Trade Administration, an agency within the Department of Commerce, safeguards American industries from unfair competition from dumped or subsidized imports. *See generally* Int'l Trade Admin., Overview: About the ITA, http://www.ita.doc.gov/overview.html (last visited Nov. 2, 2008).

42. *See* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 830–32 (4th ed. 2002).

43. The ITC is an independent, quasi-judicial federal agency that advises the President and Congress on matters concerning international trade. *See* 19 U.S.C. §§ 1330–1341 (2007). Among other things, the ITC investigates the effect of subsidized and dumped imports on domestic industries. *See generally* U.S. Int'l Trade Comm'n, About Us, http://www.usitc.gov/ext_relations/about_itc/gen_info.htm (last visited Nov. 2, 2008).

44. *See generally* JACKSON ET AL., *supra* note 42, at 727–29.

45. Antidumping duties respond to international price discrimination, in contrast with countervailing duties, which respond to government subsidization. J.-G. Castel & C.M. Gastle, *Deep Economic Integration Between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform*, 7 MINN. J. GLOBAL TRADE 1, 1 (1998).

46. Blonigen, *supra* note 40, at 410.

47. The negotiations, collectively called the Uruguay Round, spanned from 1986 to 1994. JACKSON ET AL., *supra* note 42, at 218–19. The idea for the reforms to include a new organization was not formally introduced until May 1990. *Id.* at 218. The proposal for the WTO and its supporting agreements were finalized in Marrakesh, Morocco, in April 1994. *Id.* at 219.

48. *See* Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125.

49. *See id.* at 1145; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

50. *Id.* art. I ("most favored nation treatment"). Under the GATT, "any advantage, favor, privilege or immunity granted by any [member of the WTO] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [WTO members]." *Id.* art. I.1.

protectionism of domestic goods.[51] Currently, 153 countries, including the United States and Canada, agree to abide by the WTO agreements,[52] which include, in addition to the GATT, agreements on countervailing measures[53] and antidumping.[54] When a WTO member believes another member is not abiding by its obligations under these agreements, the countries resolve the dispute in the WTO's dispute settlement system,[55] which is the "central element in providing security and predictability to the multilateral trading system."[56]

In contrast, the North American Free Trade Agreement ("NAFTA") is a regional trade agreement between the United States, Canada, and Mexico.[57] Like the WTO, NAFTA aims to expand world trade and reduce trade distortions.[58] NAFTA's scope, however, is limited to its three member nations.[59] Although NAFTA was designed to be consistent with the GATT,[60] NAFTA's provisions control in the event of a conflict between the two regimes.[61] Disputes are resolved by utilizing one of the three NAFTA-created dispute resolution mechanisms: Chapter 11, Chapter 19, or Chapter 20.[62] Specifically, Chapter 19 "establishes a mecha-

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51. *Id.* art. III ("national treatment"). Specifically, "[t]he products of the territory of any [WTO member] imported into the territory of any other [WTO member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements . . . ." *Id.* art. III.2.

52. World Trade Org., Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 2, 2008). Ninety-five percent of the world's trade is governed by the WTO. IAN F. FERGUSSON, CONG. RESEARCH SERV., THE WORLD TRADE ORGANIZATION: BACKGROUNDS AND ISSUES 2 (2007), *available at* http://www.nationalaglawcenter.org/assets/crs/98-928.pdf.

53. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14 [hereinafter SCM Agreement].

54. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-- Results of the Uruguay Round, 1868 U.N.T.S. 201 [hereinafter AD Agreement].

55. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 [hereinafter DSU].

56. *Id.* art. 3.2.

57. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA is the successor to the agreement between the United States and Canada. *See* Canada-U.S. Free Trade Agreement, U.S.-Can., Dec. 22, 1987–Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CUSFTA].

58. NAFTA, *supra* note 57, arts. 101-02.

59. *Id.*

60. *Id.* art. 103(1).

61. *Id.* art. 103(2).

62. *Id.* arts. 1115–38 (Chapter Eleven: Investment); *id.* arts. 1901–11 (Chapter Nineteen: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) [hereinafter Chapter 19]; *id.* arts. 2003–22 (Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures).

nism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent binational panels."[63]

Although the WTO agreements and NAFTA control the application of countervailing duty and antidumping laws, the laws are nonetheless vulnerable to abuse by investigating authorities.[64] Determining whether a good has been dumped or subsidized is not a neutral, technical process; rather, it is a "highly abstruse black art" that skirts the boundary between what is and what is not allowed according to international obligations.[65] Accordingly, once an industry files a complaint, the investigating authorities, subject to internal pressures that can operate to undermine their work, will strive to make an affirmative finding of subsidization or dumping.[66]

To control the potential abuse of countervailing duty and antidumping laws, the WTO rules require an importing country to prove that the subsidized or dumped goods cause, or threaten to cause, a material injury to the threatened domestic industry.[67] Similarly, NAFTA's Chapter 19 allows the exporting country to challenge countervailing and antidumping duty determinations through binational panels that decide whether the investigating agencies properly applied their domestic rules and procedures.[68]

The goal of this international oversight is to promote free trade, whereas the goal of the countervailing duty and antidumping laws, which elected lawmakers pass and powerful lobbies support, is to protect domestic industries. As the softwood lumber dispute demonstrates, politics, as opposed to pure economics, often determine the outcome of contentious, high-stakes trade disputes.[69]

B. Lumber I, Lumber II, and the 1986 Memorandum of Understanding

The first dispute between the United States and Canada,[70] which

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63. *Id.* art. 1904.

64. Hart & Dymond, *supra* note 18, at 20.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* For further discussion of how Chapter 19 panels work, see discussion *infra* Part II.C.

69. Hart & Dymond, *supra* note 18, at 20. *See* Michael Krauss, *The Record of the United States–Canada Binational Dispute Resolution Panels*, 6 N.Y. INT'L L. REV. 85, 89 (1993) ("U.S. legislation gives domestic producers the right to launch costly lawsuits against foreign rivals, with little risk of loss if the claims of unfair and injurious competition are proved groundless." (quoting ROYAL COMM'N ON THE ECON. UNION & DEV. PROSPECTS FOR CAN., FINAL REPORT 302–03 (1985))).

70. Lumber disputes between the United States and Canada stem back to when the countries began trading, before Confederation. Grafton et al., *supra* note 29, at 42. The dispute grew more

came to be known as Lumber I, began in 1982 when representatives from the United States lumber industries filed a countervailing duty petition with Commerce.[71] The petitioners' first allegation was that Canada's provincial governments were subsidizing softwood lumber by selling rights to cut standing timber ("stumpage")[72] to private buyers at prices below what the United States government charged private buyers.[73] The petitioners also alleged that imports of this product were materially injuring, or threatening to materially injure, a United States industry.[74] Although the ITC determined that there was a reasonable indication that these imports were materially injuring American industries,[75] Commerce found that the net subsidy for the Canadian stumpage programs was *de minimis* and, therefore, made a negative final countervailing duty determination.[76]

By 1985, Canadian lumber accounted for nearly one-third of the United States market, and its market share was growing.[77] In 1986, Coalition for Fair Lumber Imports ("Coalition"), a consortium of dissatisfied American lumber industry representatives, took advantage of changes in United States laws[78] and again filed a countervailing duty petition.[79] Thus began Lumber II.

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heated after World War II when mills started closing and lumber production in the United States started falling. *Id.* This Comment focuses on the latest dispute over lumber, which has been ongoing for over a quarter of a century.

71. *See* Initiation of Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, 47 Fed. Reg. 49,878-03 (Nov. 3, 1982). The case was filed by the Coalition for Fair Canadian Lumber Imports, which was acting on behalf of trade associations and producers in the United States softwood forest products industries. *Id.*

72. In general, "stumpage" refers to standing timber, and "stumpage programs" refer to the systems by which individuals and companies acquire rights to cut and remove standing timber from government forests. Final Negative Countervailing Duty Determinations: Certain Softwood Products from Canada, 48 Fed. Reg. 24,159-01, 24,167 (May 31, 1983). Setting the correct price for stumpage is important: if harvesters pay too much, they harvest fewer and lower quality trees and may lose their jobs; if harvesters pay too little, the forests owners do not receive adequate compensation, and harvesters are vulnerable to accusations of subsidization. Grafton et al., *supra* note 29, at 42, 48.

73. Kevin C. Kennedy, *A Legal History of the Softwood Lumber Dispute (in a Nutshell)*, 52 FOREST SCI. 432, 432 (2006).

74. Initiation of Countervailing Duty Investigations: Certain Softwood Lumber Products from Canada, 47 Fed. Reg. at 49,878.

75. Softwood Lumber from Canada, USITC Pub. No. 1320, Inv. No. 701-TA-197 (Preliminary) (Nov. 1982).

76. Final Negative Countervailing Duty Determinations: Certain Softwood Products from Canada, 48 Fed. Reg. at 24,160-61, 24,167.

77. Grafton et al., *supra* note 29, at 42.

78. Lawrence L. Herman, *Softwood Lumber: The Next Phase*, BACKGROUNDER (C.D. Howe Inst., Toronto, Can.), Dec. 6, 2001, at 1, *available at* http://www.cdhowe.org/pdf/Softwood_Lumber.pdf.

79. *See* Softwood Lumber from Canada, 51 Fed. Reg. 19,422 (May 29, 1986).

The Coalition alleged that Canada's provincial governments were charging too little for stumpage rights.[80] In response, the ITC made a preliminary determination that Canadian lumber imports injured the United States lumber industry, and Commerce made a preliminarily determination that the under-pricing of Canadian government timber constituted a fifteen percent subsidy.[81]

The day Commerce's final countervailing determination was due, however, the United States and Canada signed a Memorandum of Understanding[82] ("1986 Memorandum") that settled the dispute.[83] Under the 1986 Memorandum, Canada agreed to impose a fifteen percent tax on its softwood lumber exports that could be phased out if the provinces increased stumpage fees.[84] This last-minute resolution began a pattern of last-minute resolutions for the two countries in the ongoing dispute.[85]

The 1986 Memorandum had its critics. In Canada, many objected that the fifteen percent tax infringed on Canada's sovereignty over forest management.[86] The compromise embodied by the 1986 Memorandum also led to criticism that, following adverse decisions, the United States could simply change its laws[87] to reach the legal outcome that the lumber lobby desired. This perceived inequity fostered hostility in Canada to-

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80. *Id.* This filing might have intentionally coincided with the negotiation of a free trade agreement between the United States and Canada. *See* Carl Grenier, *State, Provinces, and Cross-Border International Trade*, 26 CAN.-U.S. L.J. 175, 179–80 (2000).

81. Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453-02 (Oct. 22, 1986). For more information on the difference between preliminary and final determinations, see 19 U.S.C. §§ 1671b, 1671d (2007).

82. *See* Determination Under Section 301 of the Trade Act of 1974, 52 Fed. Reg. 233 (Dec. 30, 1986). Unlike a treaty, which is legally binding upon ratification and requires the consent of the Senate, a memorandum of understanding "is an instrument concluded between states which they do not intend to be governed by international law (or any other law) and, consequently, is not legally binding." ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 32 (2d ed. 2007). For a more thorough discussion of "MOUs" and why states use them instead of treaties, see *id.* at 32–57.

83. The agreement provided that it was "without prejudice" to the position of either Canada or the United States as to whether the stumpage programs and practices of Canadian governments constituted subsidies under United States law or any international agreement. Alan F. Holmer & Judith Hippler Bello, *The U.S.-Canada Lumber Agreement: Past as Prologue*, 21 INT'L LAW. 1185, 1197 (1987) (quoting the U.S.-Canada Memorandum of Understanding on Trade in Certain Softwood Lumber Products, ¶ 3(b), Dec. 30, 1986).

84. *Id.* at 1196.

85. *See, e.g.*, Termination of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 315-01 (Jan. 5, 1987) (noting that the petitioner had withdrawn its countervailing duty petition); Coal. for Fair Lumber Imps. v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (dismissed by consent of the parties when a political settlement was reached in 1996).

86. David N. Wear & Karen J. Lee, *U.S. Policy and Canadian Lumber: Effects of the 1986 Memorandum of Understanding*, 39 FOREST SCI. 799, 800 (1993).

87. *See id.* at 801.

ward resolving disputes through the United States legal system,[88] which Canadians condemned as both partial and expensive.[89]

C. Lumber III and the 1996 Softwood Lumber Agreement

Complaints of partiality and expense only grew in Lumber III. In 1991, after three of its largest softwood lumber-producing provinces raised stumpage fees, Canada unilaterally terminated the 1986 Memorandum.[90] Reaction in the United States was swift:[91] Commerce self-initiated a new countervailing duty investigation[92] and determined that Canada was subsidizing its stumpage programs.[93]

Hopes were high, however, that the dispute would be resolved through the newly created dispute resolution provisions in Chapter 19 of the free trade agreement between Canada and the United States,[94] which would later be adopted in NAFTA.[95] Chapter 19 removed antidumping and countervailing duty appeals from the jurisdiction of domestic courts.[96] Instead, review was vested in a binational panel composed of five trade experts from the United States and Canada,[97] with each nation

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88. Kennedy, *supra* note 73, at 434.

89. *See, e.g.*, MICHAEL B. PERCY & CHRISTIAN YODER, THE SOFTWOOD LUMBER DISPUTE AND CANADA-U.S. TRADE LAW IN NATURAL RESOURCES 181 (1987), *quoted in* Kennedy, *supra* note 73, at 434. Percy and Yoder write: "[T]he quasi-judicial process of resolving trade disputes, which ostensibly gave Canadian industry their day in court during the investigative phase of the softwood lumber dispute, should not be assumed to be impartial and immune to political pressures . . . . [I]t would seem sensible to adopt the view that legal harassment is a long-term cost of doing business in the United States and that the energies of Canadian industry and government officials should be devoted to coping with and minimizing, if possible, these long-term costs." *Id.*

90. Charles M. Gastle & Jean-G. Castel, *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases Be Reformed in the Light of Softwood Lumber III?*, 26 LAW & POL'Y INT'L BUS. 823, 847 (1995).

91. *See, e.g.*, Wear & Lee, *supra* note 86, at 799 n.1 (stating that a swift response occurred because Canada's withdrawal came during a period of retrenchment for United States lumber manufacturers).

92. Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 56,055-03 (Oct. 31, 1991); *see also* Gastle & Castel, *supra* note 90, at 847–48 (noting that Commerce's initiation dispensed with the requirement of a petition from the affected United States industry). Commerce also widened the investigation into possible violations of export restrictions on raw timber from British Columbia. Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 56 Fed. Reg. at 56,057.

93. Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570-01, 22,604 (May 28, 1992) (determining 2.91% average countervailing subsidy from stumpage programs); *see also* Kennedy, *supra* note 73, at 435.

94. CUSFTA, *supra* note 57, at 386.

95. NAFTA, *supra* note 57, at 682; *see also* Greg Anderson, *Can Someone Please Settle This Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO*, 29 WORLD ECON. 585, 591 (2006).

96. *See* Krauss, *supra* note 69, at 90.

97. *Id.* (referencing CUSFTA, *supra* note 57, art. 1904 & Annex 1901.2).

assured of having at least two of its citizens serving as panelists.[98] A Chapter 19 panel would apply the importing country's countervailing duty or antidumping laws[99] and would employ the same standard of judicial review as a domestic appellate court.[100]

These new measures, which were created to ensure impartiality, however, only exacerbated tensions between the two countries during Lumber III. Shortly after recourse to Chapter 19 became available, Canada appealed Commerce's determinations[101] to a panel composed of three Canadians and two Americans.[102] After one remand,[103] the panel ruled along national lines, with the Canadian majority holding that Commerce's determinations were unsupported by United States law.[104] The decision marked a turning point, both in the dispute itself and in the lumber industry's hostile perception of Chapter 19.

After Commerce complied with the panel's instructions,[105] the United States further politicized the dispute by bringing an Extraordinary Challenge to the panel's decision.[106] The United States government con-

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98. *Id.*

99. *Id.* (referencing CUSFTA, *supra* note 57, art. 1904, ¶ 2, which allows reference to "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents"); *see also* NAFTA, *supra* note 57, art. 1904, ¶ 2 ("[T]he antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.").

100. Krauss, *supra* note 69, at 90 (referencing CUSFTA, *supra* note 57, art. 1904, ¶ 3 and citing the Canadian standard as based on the Federal Court Act, R.S.C., ch. F-7, § 28(1) (1985) (Can.) and the American standard as based on the Tariff Act of 1930, ch. 497, § 516(A), 46 Stat. 590, 735 (1930)).

101. The two issues in the case were (1) "whether the stumpage programs confer benefits on a specific group of industries ('specificity')" and (2) "whether the stumpage programs provide timber to Canadian softwood Lumber producers at preferential rates ('preferentiality')." *Certain Softwood Lumber Products from Canada (Countervailing Duty)*, USA-92-1904-01 (May 6, 1993), at 27, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=440.

102. Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, 168 C.D. HOWE INST. COMMENT. 1, 11 (2002), *available at* http://www.worldtradelaw.net/articles/macrorychapter19.pdf.

103. For more information on the remand procedure embodied in NAFTA, see discussion *infra* Part II.D.2.

104. *Certain Softwood Lumber Products from Canada (Countervailing Duty)*, USA-92-1904-01 (Dec. 17, 1993), at 7, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=440. Accordingly, the panel remanded with instructions for Commerce to determine that Canada's provincial stumpage programs did not distort the normal competitive markets for softwood lumber and were not countervailable. *Id.* In contrast, relying on *Daewoo Elecs. Co. v. Int'l Union of Elec., Technical, Salaried & Mach. Workers*, 6 F.3d 1511 (Fed. Cir. 1993), the minority stated that the majority applied the wrong standard of review and should have shown more deference to Commerce's methodology in its determinations. *Id.* at 95–96.

105. Court Decision and Suspension of Liquidation on Certain Softwood Lumber Products from Canada, 59 Fed. Reg. 12,584 (Mar. 17, 1994).

106. Although Chapter 19 decisions are binding and cannot be appealed in domestic courts, parties can bring an Extraordinary Challenge under NAFTA to a panel ruling. The appealing gov-

tended that the majority had failed to apply the proper standard of review and that two Canadian panelists had failed to disclose potential conflicts of interests.[107] In a 2-1 decision, again split along national lines,[108] the Extraordinary Challenge Committee affirmed the panel's decision.[109]

In his scathing dissent, Judge Malcolm Wilkey, the retired Chief Judge of the D.C. Circuit, accused the panel of substituting its judgment for what United States law should be, rather than deferring to what United States law was, as required by the Chapter 19 standard of review.[110] Echoing the lumber industry's hostility toward Chapter 19, he charged:

> [T]his Binational Panel Majority opinion may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read. . . . The United States never contemplated that United States law would be changed by a binational body. If the substitute appellate system does not achieve similar results in applying U.S. law, it may not be long continued.[111]

Judge Wilkey's dissent reflected the discontent in the United States with a process that not only allowed unelected foreign nationals to tell the United States how to implement its domestic laws[112] but allowed Canadian citizens to command the United States to implement its laws in a manner that favored Canadian industry.[113]

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ernment must allege either that a panel member had a serious conflict of interest or that the panel departed from a fundamental rule of procedure or exceeded its authority under NAFTA. NAFTA SECRETARIAT, CANADIAN SECTION, PERFORMANCE REPORT FOR THE PERIOD ENDING MARCH 31, 2001, § 1.2.6 (2001), *available at* http://www.tbs-sct.gc.ca/rma/dpr/00-01/NAFTA00DPR/NAFTA00dpre.pdf.

107. Mark R. Joelson, *Resolving Trade Disputes Under the NAFTA: Chapter 19 Binational Panels Come of Age*, 20 J. INT'L ARB. 121, 127 (2003).

108. Extraordinary Challenge Committee, *In re Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA, 51–52 (Opinion of Mr. Justice Gordon L.S. Hart), 33 (Opinion of The Honorable Herbert B. Morgan), 93–94 (Dissenting Opinion of U.S. Circuit Judge (Ret.) Malcolm Wilkey) (Aug. 3, 1994), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/FTA_Chapter_19/USA/ue94010e.pdf. This case remains the only instance in which a panel under Chapter 19 of both CUSFTA and NAFTA has split along national lines. Kennedy, *supra* note 73, at 435.

109. Extraordinary Challenge Committee, *In re Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA, Order Affirming Binational Panel Decisions 1 (Aug. 3, 1994).

110. *Id.* at 12–19 (Dissenting Opinion of United States Circuit Judge Malcolm Wilkey).

111. *Id.* at 11, 41. Judge Wilkey also concluded that the failure of the two Canadian panels to disclose their potential conflicts of interest was a violation of the Chapter 19 code of conduct for panelists. *Id.* at 78–94.

112. *See, e.g.*, *Economic Impacts of the Canadian Softwood Lumber Dispute on U.S. Industries: Hearing Before the Subcomm. on Trade, Tourism, and Economic Dev. of the S. Comm. on Commerce, Science, and Transp.*, 109th Cong. 15 (2006), *available at* http://commerce.senate.gov/public/_files/27294.pdf [hereinafter *Senate Hearings*] (testimony of Steve Swanson, Chairman, The Swanson Group).

113. The bifurcated panel and ECC decisions in Lumber III are unusual. For example, a 2002 study determined that 86% of Chapter 19 decisions were unanimous and, thus, not split along na-

Lumber III, therefore, had larger implications for United States trade law than a mere dispute with a neighboring country over building materials. First, in response to Lumber III, the lumber industry challenged the constitutionality of Chapter 19.[114] Second, when Congress enacted the Uruguay Round Agreements Act, the WTO-implementing legislation,[115] it included two amendments to the countervailing duty law that were intended to prevent a repeat of the Lumber III panel decision.[116]

With these changes in the law threatening to spark another long legal battle and with the United States lumber industry poised to file a new countervailing duty petition, the United States and Canadian governments began negotiating a new agreement.[117] In 1996, the two countries signed the Softwood Lumber Agreement ("SLA 1996"),[118] a five-year agreement that prohibited the United States from initiating trade actions involving softwood lumber in exchange for Canada's commitment to reduce its lumber exports to the United States.[119]

Few disputes arose under the SLA 1996,[120] which contained an ad hoc dispute resolution mechanism similar to the mechanism created by Chapter 20 of NAFTA.[121] The United States only brought one case, again disputing stumpage charges in British Columbia.[122] Perhaps as a

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tionality lines. Leycegui & Cornejo, *supra* note 10, at 198.

114. Coal. for Fair Lumber Imps. v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (dismissed by consent of the parties when a political settlement was reached before the court ruled on the constitutional issues), *cited in* David A. Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297, 315 n.82 (1998).

115. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624 (2007)).

116. Uruguay Round Agreements Act § 251, 108 Stat. at 4902.

117. Arguably, increasing profits of United States lumber producers was also a concern. Grafton et al., *supra* note 29, at 44. By 1995, Canada's market share in the United States had grown to 36%. *Id.* at 42; *see also* Ragosta, *supra* note 26, at 427 (Canada agreed to the SLA 1996 to settle Lumber III appeals). As a result of the Chapter 19 decisions, the United States returned over $800 million in tariff revenue to Canada. Grafton, et al., *supra* note 29, at 42.

118. Softwood Lumber Agreement, U.S.-Can., May 29, 1996, 35 I.L.M. 1195, 1197 (1996) [hereinafter SLA 1996].

119. Peter Lichtenbaum & Selma Lussenburg, *Canadian Law*, 31 INT'L LAW. 477, 479 (1997). Specifically, Canada limited its exports to 14.7 billion board feet per year. Chi Carmody, *Softwood Lumber Dispute (2001–2006)*, 100 AM. J. INT'L L. 664, 666 (2006).

120. For example, Pope & Talbot, a United States corporation, brought a challenge against Canada's implementation of the SLA 1996 because the agreement curtailed the exports of its Canadian subsidiary. For further discussion, see William S. Dodge, *Awards in Pope & Talbot, Inc. v. Government of Canada*, 23 HASTINGS INT'L & COMP. L. REV. 431 (2000).

121. Chapter 20 panels resolve disputes between NAFTA parties regarding application and interpretation of the treaty. David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 488 (2000).

122. *Id.* at 517.

reflection that the countries still had some faith in NAFTA's ability to settle lumber disputes, the Canadian section of the NAFTA Secretariat acted as secretariat for the proceedings,[123] and the United States and Canada agreed to supplement the SLA 1996's procedural rules with rules contained within the NAFTA Chapter 20 Model Rules of Procedure.[124] The arbitral panel convened in late 1998, but after a lengthy deliberative process,[125] both countries settled the case the day before the panel was to issue its opinion.[126]

D. Lumber IV

The brief respite from the softwood lumber dispute ended in 2001 as Lumber IV began with the expiration of the SLA 1996.[127] The day after the SLA 1996 expired, the Coalition filed both a countervailing duty petition and an antidumping petition with Commerce.[128] Soon after, the ITC made a preliminary determination that, although Canadian softwood lumber exports to the United States were not injuring the domestic industry, the exports were threatening to injure the domestic industry.[129] Commerce subsequently made a preliminary determination that Canada was conferring subsidies of almost 20% on its softwood lumber.[130]

These preliminary determinations outraged Canada. Trade Minister Pierre Pettigrew declared, "It's very frustrating to hear Americans talk the rhetoric of free trade, but when it comes time to act they support protectionist voices."[131] In a telephone conversation with President George W. Bush, Canadian Prime Minister Jean Chretien allegedly echoed Pettigrew's frustration over the United States' inconsistent views on free trade: "You want gas; you want oil; and you don't want wood? It's too bad, but if you have free trade, you have free trade."[132]

Canada challenged Commerce's preliminary determinations with the WTO, claiming that the United States had violated its WTO obligations.[133] In September 2002, the WTO panel held that the Canadian

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123. *Id.* at 518.

124. *Id.*

125. *Id.*

126. *Id.*

127. Carmody, *supra* note 119, at 666.

128. Anderson, *supra* note 95, at 600.

129. Carmody, *supra* note 119, at 666.

130. *Id.* (subsidy of 19.31%).

131. *See* Mark MacKinnon & Peter Kennedy, *Canadians Incensed over Duty on Lumber*, GLOBE & MAIL (Canada), Aug. 11, 2001, at A1; *see also* Monte Mills, *Tough Duty: U.S.-Canada Softwood Lumber Relations in 2001*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 101, 107–08 (2001).

132. Barry Brown, *Lumber Dispute Could Affect State's Imports of Canadian Gas*, BUFFALO NEWS, Aug. 23, 2001, at E1.

133. Carmody, *supra* note 119, at 666.

stumpage programs constituted a "financial contribution" to the lumber exporters, but Commerce must apply measures based on final determinations rather than preliminary determinations.[134]

The following April, Commerce issued its final determination that Canada was subsidizing softwood lumber.[135] A month later, the ITC issued its final determination that Canadian softwood lumber imports indeed presented a threat of material injury to the United States lumber industry.[136] In response to these final determinations, Canada engaged in a two-track litigation strategy, filing complaints with both the WTO and the NAFTA Chapter 19 panels.[137]

From a legal standpoint, Canada's strategy made sense because the panels established under the WTO and under NAFTA Chapter 19 apply different laws.[138] The WTO panel evaluates whether the actions of Commerce and the ITC complied with the WTO agreement, a multiparty international treaty that refers to international law for guidance.[139] In contrast, the NAFTA Chapter 19 binational panel, which replaces domestic judicial review, evaluates whether the determinations made by Commerce and the ITC conformed to United States law and applies the domestic standard of judicial review.[140] Pursuing claims under both regimes effectively gave Canada two bites at the apple and, thus, maximized its chances of obtaining favorable rulings.[141]

From a political standpoint, however, the ability of Canada to pursue two-track litigation has been criticized for "encourag[ing] litigious gamesmanship" and for making the softwood lumber dispute more difficult to resolve.[142] The conclusions reached by the WTO panels and the

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134. *Panel Report, United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, ¶¶ 7.30, 7.39, 7.104, WT/DS236/R (Sept. 27, 2002), *available at* http://www.worldtradelaw.net/reports/wtopanelsfull/us-lumbercvds(panel)(full).pdf.

135. Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,539 (Apr. 2, 2002); Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545, 15,546 (Apr. 2, 2002).

136. Softwood Lumber from Canada, 67 Fed. Reg. 36,022 (May 2, 2002).

137. Carmody, *supra* note 119, at 667.

138. *Id.* at 672.

139. *Id.* at 672–73.

140. Castel & Gastle, *supra* note 45, at 3. Accordingly, a NAFTA binational panel cannot overturn a determination that is consistent with United States law, even if the determination is inconsistent with WTO obligations. J.R. Johnson, *The Effect of the Softwood Lumber Agreement 2006 on the NAFTA Chapter Nineteen Binational Panel Process*, 13 INT'L TRADE LAW & REG. 79, 83 (Nov. 24, 2006), at 4.

141. For example, even if the Chapter 19 panels ruled that determinations made by Commerce and the ITC accorded with United States trade law, the WTO panels could rule that the determinations violated the WTO Agreement. Vice versa would also be true.

142. Sydney M. Cone III, *Canadian Softwood Lumber and "Free Trade" Under NAFTA*, 51 N.Y.L. SCH. L. REV. 841, 850 (2007).

NAFTA panels regarding Lumber IV were often inconsistent. Additionally, litigating in two forums increased costs to both Canadian and American taxpayers. More importantly, because the suits were simultaneous, the political tension between the two countries was ongoing and made settlement negotiations difficult.

Ultimately, neither the WTO's nor NAFTA's dispute settlement mechanisms satisfied either the United States or Canada: both forums were excluded in the final settlement of the SLA 2006.

1. The WTO Challenges

Canada brought three challenges before the WTO panels.[143] First, in the challenge to Commerce's final countervailing duty determination,[144] the Appellate Body held that, although its analysis was incomplete,[145] Commerce had correctly determined that the harvesting rights granted by the provincial governments constituted a potential countervailing subsidy.[146] Second, in the challenge to Commerce's final antidumping determination, the Appellate Body held that Commerce used an improper method to calculate dumping levels.[147] Finally, in the challenge to the ITC's final threat-of-injury determination, a panel held that an "objective and unbiased investigating authority" could not have properly found a threat of injury based on the reasoning and the evidence cited by the ITC.[148]

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143. *See* Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 1.1–1.3, WT/DS257/R (Aug. 29, 2003); Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 1.1–1.3, WT/DS264/R (Apr. 13, 2004); Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, ¶¶ 1.1–1.6, WT/DS277/R (Mar. 22, 2004). For the full text of WTO reports, see http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

144. Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 167, WT/DS257/AB/R (Jan. 19, 2004).

145. This decision is significant because Commerce already found, and the NAFTA panel affirmed, that "Canadian provincial timber pricing so distorted the domestic market as to make it unusable for subsidy measurement. [Thus,] even if Canada wins the current dispute, Lumber IV, the U.S. industry will be well positioned to bring future actions against the unfair pricing." Ragosta, *supra* note 26, at 431–32.

146. Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 75, 118, WT/DS257/AB/R (Jan. 19, 2004).

147. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶ 117, WT/DS264/AB/R (Aug. 11, 2004).

148. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, ¶¶ 7.89, 8.1, WT/DS277/R (Mar. 22, 2004) (inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement). On November 16, 2004, to comply with the WTO report, the ITC issued a new threat-of-injury determination that "elaborated on, but did not change, its original analysis." Carmody, *supra* note 119, at 669. Canada challenged the ITC's determination, which a compliance panel upheld, stressing the need to defer to the domestic investigating bodies. *Id.* Canada appealed, and the Appellate Body reversed, holding that the deferential standard of review applied by the compliance panel was improper. *Id.* Significantly,

Three aspects of the WTO component of Lumber IV highlight why the WTO is not the best forum to settle the softwood lumber dispute. First, the parties' ability to appeal decisions meant that the settlement process was long and expensive. Canada first sought consultations with the United States on May 3, 2002,[149] and the last WTO Appellate Body decision was not issued until August 15, 2006.[150] In light of the expense to taxpayers and the growing animosity fostered by the prolonged litigation, one of the key selling points of the SLA 2006 was a mechanism that could quickly and effectively bring some finality to the process.[151]

Second, the WTO panel reached a different conclusion than the NAFTA Chapter 19 panel regarding the ITC's threat-of-injury determination. Despite this adverse determination, however, the United States continued to impose duties because a WTO panel, applying WTO rules, upheld the ITC's threat-of-injury determination.[152] This inconsistency undermined the credibility of both panels and provided the United States lumber industry with evidence of Canada's unfair trade practices from an international source.[153]

Finally, by changing their methodology, Commerce and the ITC could continue to impose tariffs and still conform with the WTO decisions, effectively allowing the United States to avoid complying with adverse decisions.

2. The NAFTA Chapter 19 Challenges

In addition to the three WTO challenges, Canada made three similar requests for panel review under Chapter 19 of NAFTA.[154] First, in the

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however, the Appellate Body declined to review the ITC's determinations. *Id.*

149. *See* Foreign Affairs & Int'l Trade Can., Softwood Lumber, Canada's Legal Actions, WTO Challenges (2006), http://www.dfait-maeci.gc.ca/eicb/softwood/wto_challenges-en.asp (last visited Nov. 2, 2008).

150. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (Aug. 15, 2006).

151. *See* Softwood Lumber Products Export Charge Act of 2006, House of Commons Debates (Hansard), Vol. 141, No. 52, 39th Parl., 1st Sess. (Sept. 25, 2006) (Can.) [hereinafter House of Commons Debates]; *see also infra* Part II.E.

152. *See* Jeffrey L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 ALTA L. REV. 319, 346 (2007).

153. *See, e.g.*, Press Release, Coal. for Fair Lumber Imps., Coalition for Fair Lumber Imports Applauds WTO Ruling in Favor of U.S. in Softwood Lumber Dispute Regarding Unfairly Traded Canadian Lumber (Apr. 3, 2006), *available at* http://www.fairlumbercoalition.org/doc/press_release_4-3-06.pdf; *see also Senate Hearings*, *supra* note 112, at 23 (testimony of Sen. Conrad Burns) ("In . . . 2005, a [WTO] panel report concluded that 'dumped and subsidized imports of softwood lumber from Canada threatened to materially injure the U.S. industry.' . . . Montana families and business cannot be expected to compete on a market that is subsidized so largely that it drives out legitimate competition.").

154. *See Certain Softwood Lumber Products from Canada (Department of Commerce Final*

challenge to Commerce's final countervailing duty determination, the panel directed Commerce to recalculate its countervailing duty determinations because its calculations were not supported by sufficient evidence.[155] Second, in the challenge to Commerce's final antidumping determination, the panel instructed Commerce to either eliminate or recalculate its antidumping determinations as they applied to various Canadian lumber companies.[156] Third, in the challenge to the ITC's final threat-of-injury determination—the most controversial of the Chapter 19 triad—the panel directed the ITC, after a series of remands,[157] to reanalyze its injury determination.[158]

The antagonism between the ITC and the panel was acute.[159] When the ITC finally released a determination consistent with the panel's decision, the ITC protested that the determination was made only because the ITC "respect[ed] and [was] bound by the NAFTA dispute settlement process," not because the determination was accurate.[160] Dissatisfied, the United States made an Extraordinary Challenge of the panel's decision, which was unanimously dismissed.[161] The United States, nevertheless,

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Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination), USA-CDA-2002-1904-03 (Aug. 13, 2003); *Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less Than Fair Value)*, USA-CDA-2002-1904-02 (July 17, 2003); *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07 (Sept. 5, 2003).

155. *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination)*, USA-CDA-2002-1904-03 (Mar. 17, 2006).

156. *Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less Than Fair Value)*, USA-CDA-2002-1904-02 (June 9, 2005).

157. *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07 (Sept. 5, 2003); *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07 (Apr. 19, 2004).

158. *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07 (Aug. 31, 2004).

159. For example, the panel stated:

> [By relying on the same evidence that this Panel has twice found insufficient as a matter of law to support any finding of a threat of injury, the ITC] has made it abundantly clear . . . that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process.

Id. at 3. In response, the ITC stated that the panel had "violated U.S law and basic tenets of fairness." Anderson, *supra* note 95, at 608.

160. News Release, Int'l Trade Comm'n, ITC Files Response to Softwood Lumber Binational Panel Decision with NAFTA Secretariat (Sept. 10, 2004), *available at* http://www.usitc.gov/er/nl2004/er0910bb1.htm. The ITC viewed the Chapter 19 panel as "overstepping its authority, violating the NAFTA, seriously departing from fundamental rules of procedure, and committing legal error." *Id.*

161. Extraordinary Challenge Committee, *In re Certain Softwood Lumber Products from*

announced that it would not apply the panel's decision. Thus, even though Canada won each of the Chapter 19 cases, it could not claim victory, highlighting Chapter 19's flawed system of remanding decisions to investigating authorities for implementation.

Chapter 19's remand system is a central reason why it, like the WTO, is not the best forum to settle the softwood lumber dispute. Because a Chapter 19 panel cannot enforce its own decisions, it must direct Commerce and the ITC to make determinations consistent with its findings. Commerce and the ITC, having already investigated and made determinations, are inevitably reluctant to contradict their earlier findings, particularly if the consensus is that a domestic court would have held differently. All three cases before Chapter 19 panels were characterized by repeated remands and subsequent decisions, which meant that fruitless years passed before the panels issued final decisions and that the tensions feeding the dispute only worsened.[162]

Table 1

NAFTA Challenges[163]	Subsidy (Commerce)[164]	Dumping (Commerce)[165]	Threat of Injury (ITC)[166]
Preliminary Determination	Aug. 9, 2001	Oct. 30, 2001	May 16, 2001
Final Determination	Mar. 22, 2002	Mar. 22, 2002	May 2, 2002
Panel Established	Apr. 2, 2002	Apr. 2, 2002	May 22, 2002
Final Report	Aug. 13, 2003	July 17, 2003	Sept. 5, 2003
1st Remand Determination	Jan. 12, 2004	Oct. 15, 2003	Dec.15, 2003
1st Panel Remand Decision	June 7, 2004	Mar. 05, 2004	Apr. 19, 2004
2d Remand Determination	July 30, 2004	Apr. 21, 2004	June 10, 2004
2d Panel Remand Decision	Dec. 1, 2004	June 9, 2005	Aug. 31, 2004
3d Remand Determination	Jan. 24, 2005	July 11, 2005	Sept. 10, 2004
3d Remand Decision	May 23, 2005	N/A	N/A
4th Remand Determination	July 7, 2005	N/A	N/A
4th Panel Remand Decision	Oct. 05, 2005	N/A	N/A
5th Remand Determination	Nov. 22, 2005	N/A	N/A
5th Panel Remand Decision	Mar. 17, 2006	N/A	N/A
Final Outcome	Oct. 12, 2006 (ECC request withdrawn)	Jan. 5, 2007 (Case dismissed)[167]	Aug. 10, 2005 (ECC decision)

Canada, ECC-2004-1904-01USA (Aug. 10, 2005), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf.

162. Anderson, *supra* note 95, at 609.

163. Foreign Affairs & Int'l Trade Can., Softwood Lumber, Canada's Legal Actions, NAFTA Challenges, http://www.dfait-maeci.gc.ca/eicb/softwood/nafta_challenges-en.asp (last visited Nov. 2, 2008); Foreign Affairs & Int'l Trade Can., Softwood Lumber, Chronology, Lumber IV, http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp (last visited Nov. 2, 2008).

164. *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination)*, USA-CDA-2002-1904-03, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380.

165. *Certain Softwood Lumber Products from Canada (Department of Commerce Final De-*

This endless cycle of remands and decisions frustrated both countries. Canada was frustrated that the United States used the remands to stall final resolution, profit from countervailing and antidumping duties, and blackmail the Canadian government into settling the dispute on unfair terms.[168] The United States was frustrated that the findings of its investigating authorities were routinely overturned, despite Chapter 19's deferential standard of review. Furthermore, domestic lobbies were staging NAFTA rebellions in protest of an unelected international body counter-interpreting the laws that well lobbied, elected officials passed. The resolution that the Chapter 19 panels provided was that Canada continued to dump its subsidized lumber into the United States market and the United States continued to collect duties.[169] This resolution hurt both Canadian lumber producers and United States lumber consumers,[170] and it created an impasse that would only be resolved after a lengthy break in negotiations.

E. The 2006 Softwood Lumber Agreement

After an eighteen-month hiatus, negotiations for a settlement of Lumber IV resumed.[171] Because Canada had emerged the victor in the NAFTA decisions and was still appealing adverse rulings in the WTO decisions, opposition to a negotiated settlement was strong in Canada.[172] The dispute, however, was taking its toll on the Canadian lumber indus-

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termination of Sales at Less Than Fair Value), USA-CDA-2002-1904-02, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380.

166. *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380.

167. Int'l Trade Admin., N. Am. Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Notice of Panel Decision, 72 Fed. Reg. 1318-03 (Jan. 11, 2007).

168. *See* House of Commons Debates, *supra* note 151.

169. *Id.*

170. *Id.*

171. Foreign Affairs & Int'l Trade Can., Softwood Lumber, Chronology, http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp (last visited Nov. 2, 2008); *see also Senate Hearings*, *supra* note 112, at 6 (testimony of Franklin L. Lavin, Under Sec'y, Int'l Trade, Dep't of Commerce). Negotiations are complicated by the fact that United States negotiators are limited in their ability to enter into international agreements with sub-national governments, i.e., the Canadian provinces that own most of Canada's forests. *Id.* at 7. Purely regional or province-specific solutions are, thus, not an option. *Id.*

172. *See, e.g.*, House of Commons Debates, *supra* note 151 (statement by Dominic LeBlanc) ("[The Canadian lumber industries, workers, and communities] will ultimately pay the price for a bad agreement and for a global situation that will certainly lead to layoffs and serious trouble for some companies."); *id.* (statement by Peter Julian) ("The principle is not only are we selling out our softwood industry, but we are selling out any other Canadian industry that wants to use dispute settlement.").

try:[173] future outcomes of litigation were uncertain;[174] there was no guarantee that the United States would abide by future decisions or would not simply change its domestic laws to avoid compliance;[175] and five years of legal fees were becoming expensive.[176] Similarly, the United States had an interest in settling: regardless of how the international panels eventually ruled, the Lumber IV cases would not resolve the dispute;[177] United States lumber mills continued to close;[178] and the home-building and construction industries were protesting the high, fluctuating prices of lumber.[179]

The Softwood Lumber Agreement 2006 (SLA 2006) was the compromise.[180] During Lumber IV, the United States had collected five billion dollars in duties and had refused to apply the NAFTA decisions prescriptively. Under the SLA 2006, the United States agreed to return four billion dollars in duties to Canada but retained the remaining one billion dollars.[181] For the next seven to nine years, the United States agreed not to impose duties on lumber imports, and in exchange, Canada agreed to limit its importation of lumber to one-third of the United States market.[182] Both sides agreed to end existing litigation and resolve all future disputes that arise under the agreement in the London Court of International Arbitration ("LCIA").[183] The parties hoped that this latest agreement would end over twenty years of bickering over softwood lumber.

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173. *See, e.g.*, *id.* (statement by Randy Kamp) ("[The parliamentarians] have seen the toll, both human and financial, that this dispute has taken, and we need to bring an end to this.").

174. *See, e.g.*, *id.* (statement by James Rajotte) ("The fact is that we had a choice between further litigation, and even if we won all of the current legal cases before the courts at present, the United States could easily alter legislation and start another round of litigation.").

175. *See, e.g.*, Anderson, *supra* note 95, at 590 n.14 (quoting Canadian Prime Minister Paul Martin: "[The United States is] an extremely litigious society [that seems] to be able to find ways around what were supposed to be binding settlements.").

176. *See, e.g.*, House of Commons Debates, *supra* note 151 (statement by Richard Harris) ("challenge after challenge amounting to hundreds of millions of dollars in increased legal fees").

177. *Senate Hearings*, *supra* note 112, at 11 (testimony of Susan Schwab, Deputy U.S. Trade Rep.) ("[G]iven the long history of this disagreement, there is little reason to believe that the current round of cases will resolve the matter once and for all, regardless of how the process plays out. Without a negotiated solution, chances are high that the dispute will continue.").

178. *Id.* at 24 (testimony of Bill Kluting, Legis. Rep., Western Council of Indus. Workers) (testifying that after working for thirty-nine years at a Northwest mill, the mill closed, in large measure, because of the Canadian lumber industry and noting that the average laid-off mill-worker takes between ten and twelve years to regain his prior rate of pay).

179. *Id.* at 52 (prepared statement of Nat'l Lumber & Bldg. Material Dealers Ass'n).

180. SLA 2006, *supra* note 6.

181. More specifically, $500 million will be given to the United States lumber companies that brought the trade complaints; $450 million will be used to fund lumber-promoting initiatives; and $50 million will be used to establish a binational industry council. 2004–2008 USDA U.S. FOREST PRODUCTS ANN. MARKET REV. & PROSPECTS, *supra* note 19, at 8.

182. SLA 2006, *supra* note 6, arts. V, VII.

183. *Id.* art. XIV(6).

III. THE DISPUTE SETTLEMENT PROVISION OF THE SLA 2006: EVIDENCE OF LESSONS LEARNED IN THE SOFTWOOD LUMBER DISPUTE

The softwood lumber dispute has shown that the United States and Canada have different, often conflicting opinions about what the dispute resolution mechanisms should accomplish. For Canada, the mechanisms should ensure that the United States obeys free trade rules and does not artificially interfere with Canada's competitive advantage in the lumber market to protect its own lumber industry.[184] For the United States, the mechanisms should, first, ensure that Canada competes fairly and, second, defer to administrative determinations that Canada is dumping subsidized lumber in the United States market at the expense of United States lumber producers.[185] Each side firmly believes that it is right; each side is willing to aggressively defend its position. In light of these entrenched positions, agreeing on a proper dispute settlement mechanism was a challenge. The compromise that Canada and the United States reached, however, addressed the lessons the countries had learned from the dispute in a way that will minimize conflict in future disputes, provided that an agreement remains in place.[186]

The dispute settlement provision in the SLA 2006 creates a two-step process to settle disputes.[187] The first step requires that parties consult with each other before submitting a request for arbitration.[188] The importance of this first step is that it forces the United States and Canada to strive for a negotiated settlement of their differences.[189] The second step involves submitting the dispute to arbitration. The LCIA has jurisdiction over any disputes that arise under the SLA 2006:[190] LCIA rules apply;[191] the legal place of arbitration is London;[192] and decisions cannot be appealed.[193] In selecting the arbitral panel, each party nominates one arbitrator who cannot be a citizen or resident of either party; the two no-

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184. *See* Anderson, *supra* note 95, at 609.

185. *See id.*

186. The SLA expires seven years from the date of effective force, with the option of a two year extension if the United States and Canada agree. SLA 2006, *supra* note 6, art. XVIII.

187. Roger Alford, Opinio Juris, Softwood Lumber Goes to LCIA, http://opiniojuris.powerblogs.com/posts/chain_1191286269.shtml (last visited Nov. 2, 2008).

188. *See* SLA 2006, *supra* note 6, art. XIV(4)–(5). The parties have 20 days to begin consulting and 40 days to resolve the matter after delivery of the request. *Id.* art. XIV(4), (6).

189. *See generally* Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000).

190. SLA 2006, *supra* note 6, art. 14(6).

191. *Id.*

192. *Id.* art. XIV(13). All hearings are conducted in the U.S. or in Canada, at the tribunal's discretion. *Id.*

193. LCIA Arbitration Rules (effective Jan. 1, 1998), *available at* http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf (last visited Nov. 10, 2008).

minated arbitrators then jointly nominate the chair of the tribunal who, similarly, cannot be a citizen or resident of either party.[194] The LCIA Court must approve, or formally "appoint," each nominee.[195] Furthermore, parties are not permitted to initiate any litigation or other dispute settlement proceedings, including proceedings under the WTO or Chapter 20 of NAFTA.[196] Having the LCIA as the only option reduces costs to each side and keeps the political tensions behind the WTO and NAFTA out of the dispute itself.

This Part explains four reasons why the dispute resolution mechanism in the SLA 2006 will be more efficient and effective at settling battles in the softwood lumber dispute than the previous dispute resolution forums: (a) the expense and schedule, (b) the parties' waiver of appeals, (c) the governing law, and (d) the identity of the resolving body.

A. Expense and Schedule

A faster schedule reduces costs and resolves small disputes before they gain momentum. Although the schedule stipulated in the SLA 2006 is longer than the schedule stipulated in the SLA 1996, the SLA 2006's schedule is significantly shorter than the schedule established by NAFTA's Chapter 19, particularly when one factors in the possibility of remands back to the investigating authorities. It is also shorter than the schedule established under the WTO's DSU, particularly when one factors in the added time for appeals, compliance review, and appeals of compliance review. All four mechanisms have shorter schedules than litigation in United States federal courts.

Table 2

SCHEDULE[197]	SLA 2006[198]	SLA 1996[199]	WTO: DSU[200]	NAFTA: Ch. 19[201]
Consultations begin	20 days	20 days	30 days	N/A
Consultations end; request for arbitration	40 days	35 days	60 days	N/A
Panel set up; panelists appointed	105 days	70 days	105 days	61 days
Final decision	285 days	135 days	365 days	315 days

194. SLA 2006, *supra* note 6, art. XIV(7)–(10).

195. *Id.* art. XIV(11).

196. *Id.* art. XIV(2).

197. The count begins with the request for consultation. The figures in Table 2 are approximations and do not factor in remands, Extraordinary Challenges, appeals, or compliance review.

198. *See* SLA 2006, *supra* note 6, art. XIV(4), (6), (9), (10), (11), (19). The SLA 2006 provides that the reasonable period of time a party has to cure a breach ends after 315 days from the request for consultation. *See id.* art. XIV(22)(a). At this time, compensatory export measures can be imposed. *Id.* art. XIV(22)(b).

An expedited schedule limits the cost of settling the dispute. The softwood lumber dispute has been characterized by unresolved, drawn-out litigation. Every administrative investigation, every panel request, and every appeal costs taxpayers in both countries millions of dollars, costs the lumber industries in both countries millions in lost profits and unquantifiable amounts in lost jobs, and costs the home-building and construction industries millions from increased lumber prices and decreased lumber quality.[202] Worst of all, the litigation in previous lumber disputes was seemingly endless in both time and expense.[203] It had become uneconomical to continue, despite potential benefits to domestic industries, and it had become impractical to continue, despite convictions on either side.[204] In contrast, the dispute settlement provision in the SLA 2006 minimizes the risk of interminably wasting money. The schedule is fixed; it is fast; and it is paid from funds that Canada and the United States have already allocated.[205]

An expedited schedule also limits the time during which the dispute can worsen. For example, during Lumber IV, as NAFTA panels remanded their decisions to Commerce and the ITC, the United States continued to collect tariffs on imported Canadian lumber. In other words, as the two countries fought over the proper market price of lumber, the consumers in the United States continued to pay artificially inflated prices, and unlike the lumber companies in Canada, these consumers never had

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199. *See* SLA 1996, *supra* note 118.

200. DSU, *supra* note 55, art. 4(3); World Trade Org., Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Nov. 2, 2008). The total time for a decision that includes an appeal is one year and three months.

201. NAFTA Secretariat, Overview of the Dispute Settlement Provisions of the North American Free Trade Agreement (NAFTA), Ideal Timeline for a NAFTA Chapter 19 Panel Review as per the Rules of Procedure, http://www.nafta-sec-alena.org/defaultSite/index_e.aspx?DetailID=8 (last visited Nov. 2, 2008). Because neither the website nor Chapter 19 provides for the length of time consultations might take, the count of days begin with the complaining party's request for arbitration.

202. If harvesters are forced to pay more for stumpage, then they harvest fewer trees. Grafton et al., *supra* note 29, at 42.

203. *See* House of Commons Debates, *supra* note 151 (statement by Richard Harris) (If Canada did not agree to the SLA 2006, then "years of uncertainty and years of litigation would be guaranteed. . . . U.S. law is far different from what [Canada] would like to operate under . . . . Challenges could be changed; every time somebody wanted to speak it could be taken up in the courts, and another few hundred million dollars in legal fees could be spent.").

204. *See id.* (statement by Hon. Maxime Bernier, Minister of Industry, CPC) ("[The SLA 2006] eliminates the punitive American duties, puts an end to costly legal proceedings, and gets our softwood lumber producers out of the courts. Since 2002, this dispute has cost more than $35 million in fees that the Government of Canada has paid to help the softwood lumber industry fight this battle.").

205. SLA 2006, *supra* note 6, art. XIV(21), provides for a $10 million (U.S.) allotment from funds already allocated.

the difference returned to them. Furthermore, continuing to collect the tariffs put enough economic pressure on Canada to force it to settle the dispute, rather than litigate the cases it perceived it was winning.[206] This economic pressure increased tensions between the two countries and overflowed into other areas of international relations.

B. Waiver of Appeals

The LCIA rules provide no option for appealing decisions.[207] The lack of an opportunity to appeal shortens the time of the dispute, preventing the underlying situation from worsening and minimizing the expense of litigation, which grew prohibitively in Lumber IV.

In Lumber IV, the ability to appeal decisions of Commerce and the ITC, the WTO panels, and even the Extraordinary Challenge of the NAFTA panel's ruling on the ITC worsened the conflict. Both countries continued to appeal adverse rulings while engaging in the very trade practices that were in dispute. The final settlement of the SLA 2006 was arguably more a result of battle fatigue than a genuine agreement to resolve fundamental differences over pricing in the two lumber industries.

LCIA rules offer a clean reprieve: final decisions of the arbitration tribunal cannot be appealed. The advantage of not allowing appeals is that it promotes stability and certainty in both markets, and parties can rely on the agreement itself to regulate lumber output. The United States and Canada either will have to abide by the tribunal's decision or will have to terminate the agreement.[208]

Furthermore, the LCIA's prohibition of appeals eliminates the possibility of escalating political tensions. In the softwood lumber dispute, the appellate process has served to heighten animosity between the two countries. Canada viewed the United States as utilizing the appellate process to delay resolution and, at the country's most extreme rhetoric,

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206. *Compare* House of Commons Debates, *supra* note 151 (statement by David Emerson, Minister of Int'l Trade, CPC) ("Dumping duties are pernicious in weak markets. Dumping duties grow. An administrative review indicates that dumping duties will grow this fall. Even if we continue to win current litigation, that litigation will be appealed."), *with id.* (statement by Peter Julian) ("We are in a situation where it is not a question of seven years of litigation, as the Prime Minister said so irresponsibly. We were in the final two hurdles, a few board feet short of winning those two non-appealable victories, and the government has snatched defeat from the jaws of victory, which is highly irresponsible.").

207. LCIA Arbitration Rules, *supra* note 193, arts. 26.9, 29.2 (unless otherwise agreed). Under the DSU, in contrast, the Appellate Body has the power to uphold, modify, or reverse the legal findings and conclusions of the panel. DSU, *supra* note 55, art. 17(13).

208. The SLA 2006 has a controversial termination clause that allows either party (the United States or Canada) to terminate the agreement after it is has been in force for eighteen months, provided that the party provides six month's notice. All trade remedy actions must be postponed for twelve months following termination. *See* SLA 2006, *supra* note 6, art. XX.

as holding Canadians hostage when the United States lumber industry faltered. In contrast, the United States viewed Canada, first, as utilizing the appellate process to undermine justified rulings in the United States' favor and, second, as capitalizing on an international animosity toward United States' trade practices. Under the SLA 2006, although one country may be dissatisfied, the arbitration tribunal's decision will be final and binding.

C. Governing Law

Under the SLA 2006, the place of arbitration is London,[209] which means English law is the *lex fori*.[210] This gives neither party a legal or political advantage.

The SLA 2006 tribunal decisions will be more consistent and accurate because the arbitrators only interpret the SLA agreement. In contrast, for example, the Chapter 19 panels determine whether the antidumping, countervailing duty, and injury determinations were made in compliance with domestic law.[211] Thus, under Chapter 19, a binational panel has the final decision on whether Commerce or the ITC has followed its own laws correctly. The panel must apply the domestic standard of review[212] and the same legal principles that a domestic court would apply in reviewing a determination of the investigating authority.[213] As Lumber III illustrated, however, impartial review is difficult when the panelists are not experts in appellate review in the country whose laws are at issue.[214]

Unlike the Chapter 19 panels, the tribunal established under the SLA 2006 does not interpret United States law. The LCIA arbitration panel is limited to interpreting compliance with the agreement itself, under English legal principles. This difference shields the LCIA from the criticism of Canadian bias that the United States lumber industry directed at Chapter 19 panels. Because the SLA 2006 tribunal is solely concerned with interpreting a trade agreement and does not apply domestic or international laws, the risk of the LCIA employing the wrong standard of review is less than with Chapter 19 panels.

Furthermore, in contrast with Chapter 19 panel decisions, which can be subverted by changing domestic law,[215] if the LCIA's decision is

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209. *Id.* art. XIV(13).

210. *See* Alford, *supra* note 187. *Lex fori* means "the law of the forum." BLACK'S LAW DICTIONARY 929 (8th ed. 2004).

211. Chapter 19, *supra* note 62, art. 1902.

212. *Id.* Annex 1911.

213. *Id.* art. 1904(3).

214. Anderson, *supra* note 95, at 593.

215. Decisions against the United States result either in the law being changed, the United

unfavorable to the United States, the government will have to either comply or terminate the agreement. Because the agreement is between the executive branches of Canada and the United States, the substance of the agreement cannot be changed by a legislature vulnerable to political pressure.

Finally, the laws governing enforcement of a tribunal established under the SLA 2006 are tidier than the laws governing enforcement of NAFTA panel decisions. The New York Convention[216] mandates domestic judicial enforcement of all final decisions made by the arbitration tribunal.[217] Enforcement of Chapter 19 panel decisions is more complicated.[218] Panels cannot enforce their own decisions.[219] Because Chapter 19 panels interpret United States law, Congress can change laws that lead to unfavorable outcomes, which only prolongs these types of disputes.[220] Furthermore, panels are ad hoc and do not have to follow precedent, even though NAFTA explicitly mandates that the standard of review is the same as applied in the domestic legal system.[221] This means that panel decisions will differ from an appellate decision in the domestic country. The LCIA, in contrast, interprets an agreement and not domestic law, and the LCIA is the only forum to interpret that agreement, therefore making aberrant decisions are less of a concern.

D. Identity of the Resolving Body

Using the LCIA increases the perceived legitimacy of the dispute settlement mechanism. The LCIA is a private, not-for-profit company that has built its reputation on resolving commercial disputes since its founding in 1892.[222] Like all private arbitration businesses and unlike, to a certain degree, the mechanisms established under international treaties,

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States refusing to comply, or the domestic lumber producers challenging the constitutionality of the entire process. A legislature can subvert the decision of a Chapter 19 panel by changing a domestic law. Although such changes cannot be retrospectively applied to adverse Chapter 19 decisions, they can ensure that no Chapter 19 decision is dispositive: put more simply, once the laws are changed, the decisions no longer apply, and the United States can impose new tariffs.

216. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention is a treaty ratified by over 135 countries that provides that a decision by an international arbitral tribunal in a member state will be enforced by the domestic courts of any other member state as if the decision were by that domestic court. BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 17 (5th ed. 2007).

217. CARTER ET AL., *supra* note 216, at 17.

218. *See* discussion *supra* Part IV.C.

219. Blonigen, *supra* note 40, at 422.

220. *See* Anderson, *supra* note 95, at 594 n.36.

221. *Id.* at 594.

222. LCIA, History of the LCIA, http://www.lcia-arbitration.com (follow "About the LCIA" hyperlink; then follow "History of the LCIA" hyperlink) (last visited Nov. 2, 2008).

LCIA's solvency depends on resolving disputes efficiently and impartially. Furthermore, the LCIA's ability to attract new states to utilize its services will be predicated, in part, on its ability to solve the disputes that have arisen under the SLA 2006. This business model, developed through decades of successfully interpreting private agreements, may prove equally successful in interpreting an agreement between two states that protect the private interests of two industries.

The lumber industries' familiarity with commercial arbitration and the LCIA's established reputation make the LCIA a more respected and acceptable forum than an ad hoc panel. Although the current dispute is between two states, the force that pushes the dispute forward is the lumber industry. The lumber industries in both the United States and Canada are sophisticated entities familiar with settling disputes through commercial arbitration. The growth of commercial arbitration as a means of settling disputes in the United States means that the domestic critics of NAFTA and the WTO within the lumber industry will likely be more comfortable with the business-friendly model of the LCIA. Therefore, because leaders within the lumber industry can appreciate the LCIA's business incentive to ensure a fair outcome to the dispute, arbitration in the LCIA will be less encumbered than it was under the DSU or under Chapter 19. In addition, the LCIA has a reputation as one of the premier organizations at settling commercial disputes. It thus lends legitimacy with name-brand recognition in a way that an ad hoc tribunal does not.

Furthermore, recourse to the LCIA might have the interesting effect of saving Chapter 19 from its political critics. The softwood lumber dispute has frequently served as a vehicle for challenging Chapter 19 itself. The Coalition has twice challenged the constitutionality of Chapter 19 in federal court, first following the disastrous split down national lines in Lumber III,[223] then again during Lumber IV.[224] The softwood lumber agreements caused these suits to be dismissed, but following the termination of SLA 2006, another constitutional challenge is likely. With the notable exception of the softwood lumber disputes, however, Chapter 19 has been effective in resolving disputes—its panels have successfully

223. Coal. for Fair Lumber Imps. v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (dismissed by consent of the parties when a political settlement was reached before the court ruled on the constitutional issues), *cited in* Gantz, *supra* note 114, at 315 n.82.

224. Coal. for Fair Lumber Imps. v. United States, 471 F.3d 1329 (D.C. Cir. 2006). Central to the Coalition's claims was that Chapter 19 (1) deprived United States industries of their constitutionally protected rights of due process and judicial review, Brief of Petitioner at 36–48, 62–66, Coal. for Fair Lumber Imps. v. United States, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366); (2) stripped the President of his authority and responsibility to execute United States trade law, *id.* at 53–56; and (3) allowed foreign nationals to instruct federal agencies how to interpret and enforce United States laws, *id.* at 48–52.

resolved over two dozen cases between Mexico, Canada, and the United States.[225] As long as lumber litigation occurs outside of the jurisdiction of the United States courts, a broadside challenge to Chapter 19 will remain unlikely.

In addition, removing the softwood lumber dispute from Chapter 19 could serve as an impetus for the negotiation of a more effective dispute resolution system. The softwood lumber dispute is too politically charged to combat domestic criticism of Chapter 19. Tension between the United States and Canada was so taut during Lumber IV that any attempts to fix Chapter 19 would have been futile.[226] Removing the softwood lumber dispute from Chapter 19 will allow the United States and Canada—as well as Mexico—to negotiate a better mechanism without a backdrop of hostility poisoning negotiations.[227] "Fixing" Chapter 19 might not be necessary as long as the mechanism is not used to resolve the softwood lumber dispute.

The exclusion of NAFTA from the SLA 2006 drew speculation that the Chapter 19 mechanism had outgrown its usefulness. Speculation as to the demise of Chapter 19 was not new to the softwood lumber dispute: the SLA 1996 provision for an arbitral body outside of Chapter 19 drew criticism that the mechanism needed reform. In light of Chapter 19's successes in other areas,[228] one possible explanation for the special case of the softwood lumber dispute is that it is simply "too big" for Chapter 19.[229] According to this argument, given the duration and intensity of the dispute, the political differences between the United States and Canada, and the fundamental differences in the two countries' lumber industries, no dispute resolution mechanism can be expected to adequately resolve

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225. *See, e.g.*, NAFTA Secretariat, NAFTA Chapter 19 Binational Panel Decisions, Reviewing U.S. Agencies' Final Determinations, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380 (last visited Nov. 10, 2008).

226. As David Emerson, Canada's International Trade Minister, explained: "When we were under Chapter 19 disputes, the atmosphere was absolutely poisonous. You could barely talk about any file with the United States because the temperature and the public antagonism was so severe around the dispute-resolution processes under NAFTA that it was contaminating the whole relationship." *U.S. Unhappy with Canada on Lumber Deal*, ABC MONEY, Aug. 15, 2007, http://www.abcmoney.co.uk/news/1520071191113.htm (last visited Nov. 10, 2008).

227. Emerson has stated that knowing the latest softwood dispute will be settled by binding arbitration with the LCIA has allowed him to have cordial bilateral sessions at NAFTA meetings with U.S. Trade Representative Susan Schwab. Cordiality was not possible while the dispute was being litigated before the Chapter 19 panels. *Id.* Emerson continues: "Now [Canada and the United States] have disagreements—as we will always have—and we are actually able to carry on in a workmanlike, professional way." *Id.*

228. *See, e.g.*, NAFTA Secretariat, NAFTA Chapter 19 Binational Panel Decisions, Reviewing U.S. Agencies' Final Determinations, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380 (last visited Nov. 10, 2008)

229. *See* Michael S. Valihora, *NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada?*, 30 CASE W. RES. J. INT'L L. 447, 471 (1998).

the softwood lumber dispute. This proposition, however, leads to the following question: Will the softwood lumber dispute be "too big" for the LCIA?

IV. THE SOFTWOOD LUMBER DISPUTE IN PERSPECTIVE

Like its predecessor dispute resolution mechanisms, the LCIA will be unable to resolve the softwood lumber dispute. In trade disagreements, dispute resolution mechanisms are useful but limiting. Although panels can sift through a myriad of submissions and counter-submissions to identify the significant facts and legal issues, the disputes themselves are limited to technical violations of the underlying agreement. No mechanism can completely resolve trade wars like the softwood lumber dispute because the domestic interests of the litigating countries are too entrenched and receive too much political support to be resolved apolitically. Furthermore, even under legally binding agreements like NAFTA and the WTO, compelling sovereign states to comply with judgments that conflict with states' perceived interests can be difficult, if not impossible. Thus, the LCIA will probably be able to resolve disputes involving softwood lumber without resolving the softwood lumber dispute.

Although the battles may be resolved through LCIA, the war will not end. The current claims of the United States involve disagreements over technical interpretations of the SLA 2006, not fundamental disagreements over forest management or the application of United States law. Although the dispute and its twenty-five years of warring industries loom in the background, adverse parties and contentious disputes are not new to the LCIA. Therefore, as long as there is an agreement in place, the LCIA should prove an effective means of settling conflicts that fall under that agreement.

This Part briefly highlights two reasons why the LCIA, although capable of settling conflicts under the SLA 2006, cannot resolve the softwood lumber dispute: (a) the success of the LCIA is premised on the existence of a bilateral softwood lumber agreement; and (b) the dispute is too political to maintain a bilateral softwood lumber agreement.

A. The Necessity of a Softwood Lumber Agreement

The SLA 2006 is a bilateral agreement that will expire after seven years.[230] One advantage of a bilateral agreement is that it allows the American and Canadian executive branches to agree upon a forum to settle their disputes. Without a softwood lumber agreement, however, private international arbitration courts, like the LCIA, cannot help re-

230. SLA 2006, *supra* note 6, art. XVIII.

solve the softwood lumber dispute. Unless previously agreed, neither the United States nor Canada is legally required to submit to ad hoc arbitration at the request of the other country. Without the bilateral agreement, therefore, these disputes must be resolved under one of the existing legal systems that have already proved ineffective: NAFTA panels, WTO panels, or the United States legal system.

In the absence of an agreement, even if the United States and Canada chose to settle disputes with a private international arbitration court, there is little reason to think that such a court would prove much more effective than previous courts. For example, part of the attraction of private international arbitration courts is their proficiency at interpreting complicated agreements. Without an agreement, arbitrators would have to interpret the same domestic and international trade laws that have stymied WTO and NAFTA panels. They would encounter the same problems that the WTO and NAFTA panels encountered. Arbitrators would not only have to determine the appropriate degree of deference to give investigating authorities but also provide such deference even where it conflicted with their understanding of trade law. Furthermore, adding a private international arbitration institution into the fray of available forums would increase the chance of conflicting findings between different forums.

Moreover, as production prices and market demands fluctuated, the lumber industries would continue to sue, or lobby their government to sue, in the venues they calculated would most likely rule in their favor. Because there would be no bilateral agreement suspending or terminating all existing litigation, arbitrators' findings and holdings could be contradicted by the findings and holdings of other legal systems litigating the same issues. Therefore, unless all future American and Canadian administrations can negotiate, execute, and obey a continuous softwood lumber agreement, Lumber V is inevitable.

B. Cyclical Politics

Future American and Canadian administrations will not negotiate, execute, and obey a continuous softwood lumber agreement because it is not in their best political interests. The catalysts for a new battle will inevitably reappear. Past softwood lumber battles routinely began with the same two political problems: a downturn in the domestic lumber industry and an increase in Canadian lumber producers' share of the United States market. Considering the breadth of the United States-Canada trade relationship, however, catering to the concerns of the United States lumber industry is often not in the best political interests of the Executive Branch. The President and trade representatives often must prioritize

other concerns ahead of a political softwood lumber solution. For example, in the mid-1980s, as President Reagan negotiated the free trade agreement with Canada, senators from lumber producing states conditioned their approval on restricting Canadian access to United States lumber markets.[231] Despite promises from the U.S. Trade Representative to "get timber fixed," the United States took negotiations with Canada over softwood lumber off the table.[232] The Canada-United States Free Trade Agreement was too important. In the end, Canada and the United States signed the free trade agreement; the lumber problem remained unfixed; and Lumber II began.[233]

The history of the softwood lumber dispute is cyclical because the political pressures that propel the dispute are cyclical. With depressed local economies and backlashes toward free trade come calls for protectionism.[234] A powerful lumber industry lobbies its lawmakers for favorable legislation. The Coalition files a complaint with Commerce and the ITC, both of which determine that Canada is engaging in unfair trade practices that threaten to injure American lumber producers. Canada sues in an international forum that, after a drawn-out process, decides against the United States. Pressured by powerful lobbies and attempting to stave off anti-trade pressure, the United States government stalls and finds ways not to enforce the decision. Members of Congress lobby the Executive Branch for an advantageous bilateral agreement, to which the Canadian government capitulates because duties and quotas are taking too large a toll on its lumber industry. When the provincial antagonism toward the specifics of the agreement culminates, Canada either withdraws from or fails to renew the agreement, and the process begins again.

As long as the lumber industries in Canada and the United States apply political pressure to protect their industries and as long as politicians cave in to that political pressure, the softwood lumber dispute will continue.

V. CONCLUSION

The LCIA is an efficient and effective forum to settle disputes that arise under the SLA 2006. The LCIA provides a fast resolution of disagreements over the agreement's implementation, precludes lengthy ap-

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231. Daowei Zhang & David Laband, *From Senators to the President: Solve the Lumber Problem or Else*, 123 PUB. CHOICE 393, 397 (2005).

232. *Id.*

233. *See id.*

234. *Cf.* Robert K. Rae, *The Politics of Cross Border Dispute Resolution*, 26 CAN.-U.S. L.J. 63, 67 (2000) ("It is fair to say that at every juncture [of the 200 years of trading lumber between the United States and Canada], the issue of protectionism has risen again.").

peals, and makes decisions free of political bias. The LCIA, therefore, should prove capable of what it aims to do: solve commercial disputes that arise under an agreement. After the agreement expires, however, Lumber V will need to be litigated.

The softwood lumber dispute will not be solved legally because the dispute is simply too faceted for available legal regimes to handle. Nor will the softwood lumber dispute be solved politically: economic downturns, hostility toward free trade, and political pressure from two lumber industries with a twenty-five year grudge are not likely to disappear. The softwood lumber dispute may, however, be solved economically.

One potential economic solution is consolidation within the industry. As large Canadian and United States corporations invest heavily in the lumber industries on both sides of the border, large-scale lobbying efforts will focus on brokered agreements that maximize profits. Self-righteousness and bickering over land use is inefficient, particularly to those more concerned about shareholder profits than about job losses. Although the desirability of this solution is debatable, it would at least provide stability to an industry that cannot survive years of litigation.

Another potential economic solution is harmonizing the United States and Canadian systems of forest management. To what extent this is possible is unknown; however, on an abstract level, compatible systems would prevent one system from being subsidized to the detriment of the other.

Ultimately, considering the current state of the United States housing crises and the crisis it is producing in the lumber industries of both nations, economic considerations may force these two nations to seek a long-term agreement beyond SLA 2006. A long-term agreement would ensure continued recourse to forums such as the LCIA, which is a more effective means of pacifying battles than previous dispute resolution forums. Both the WTO and NAFTA dispute mechanisms have proven not only inefficient and uneconomical in settling the softwood lumber dispute but also more apt at aggravating the conflict than solving it.

A resolution would give Canada and the United States what both countries want: a healthy trade relationship in softwood lumber and profitable lumber industries. Until economic conditions allow these two countries to harmonize their lumber industries and resolve the underlying dispute, however, the political solution of a bilateral softwood lumber agreement and the legal solution of a private international arbitration forum like the LCIA will provide the most effective means for promoting trade and strengthening domestic lumber production.